SEP 17 2004

No. 04-269

In the Supreme Court of the United States

NICK STOKOVICH,

Petitioner,

v.

THE VILLAGE OF LAKE VILLA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Village of Lake Villa ("Lake Villa"), an Illinois Municipal Corporation, respectfully submits this brief in opposition to Petitioner's, Nick Stokovich, petition for writ of certiorari.

Jurisdiction

This Court does *not* have jurisdiction pursuant to *28 U.S.C. 1257.* The February 20, 2004, Illinois Supreme Court opinion is not a final order within the meaning of the jurisdiction statute. The case was remanded for further proceedings which will include a determination by the trial court if Stokovich will be given another opportunity to repair the building. The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

Statement of the Case

The building which is the subject of this litigation is a three story structure which is about 100 years old. (RP[1]-69, 436) The Stokovich family acquired the property in 1949. (RP-64) It was then used as a nursing home until 1977. (RP-64) The Stokovich family then ceased using this facility as it had built a new nursing home in Libertyville. (RP-64) It is undisputed that the building has not been occupied since 1992.

The Lake County, Illinois building department performs building inspection services for Lake Villa pursuant to a contract between the County and Lake Villa. (RP-232-233) On September 25, 1997, the building was red-tagged.

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[1] References to the record on appeal are as follows: (RP=transcript of trial court proceedings) (C=record on appeal), (Pl.Ex.=Plaintiff's Exhibit.).

(Pl.Ex. 34, 3rd page) The red tag indicated the building was unsafe, dilapidated, and animal infested. On October 3, 1997, the building department advised Dorothy Stokovich that the unsafe abandoned structure must be brought up to present building code or demolished. (Pl.Ex. 18).

No action was taken to demolish the building, to secure a building permit, nor to do any corrective work on the building. On January 7, 1998, the village attorney wrote to both Dorothy and Nick Stokovich that the building was in dangerous and unsafe condition and must be demolished within 30 days. (Pl.Ex. 5) The defendants did not demolish the building, secure a building permit, nor do any corrective work. (RP-348-349)

On February 18, 1998, Lake Villa filed its single count complaint for demolition of the building pursuant to 65 ILCS 5/11-31-1. (C-1-9) The defendants are Dorothy Stokovich[2] as Trustee under Trust Agreement dated September 16, 1992, Nick Stokovich, and Unknown Owners. Dorothy Stokovich is the mother of Nick Stokovich.

On August 20, 1998, Lake Villa filed its amended complaint. (C-113-168) Count I sought demolition. Count II sought in the alternative an order to require the defendants to do the necessary corrective work, and Count III sought fines for various Property Maintenance Code ("PMC") violations. Defendants filed an answer to Counts I and II but also filed a motion to dismiss Count III. (C-171-172) The defendants admitted that the property was red-tagged and that they had received the building department letter. (C-173-174) In their motion to dismiss,

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[2] Dorothy Stokovich is deceased. The current trustee is Bank One.

defendants argued inter alia that they were not given specific notice and an opportunity to repair. (C-173-174) This motion to dismiss was denied on September 22, 1998. (C-180) Defendants then on October 6, 1998, filed another motion to dismiss count III. (C-185-187) On October 29, 1998, the motion to dismiss count III was granted. (C-207)

On November 17, 1998, by certified mail (Pl.Ex. 7), and on December 11, 1998 by first class mail (Pl.Ex. 9), Lake Villa sent the defendants a supplemental notice. This same notice was also posted on the building on December 14, 1998, by Lieutenant Visconti. (Pl.Ex. 8) The supplemental notice provided in part:

> This notice supplements and expressly does not supersede the prior notice dated January 7, 1998, from myself to you.
>
> In the event that you do not desire to demolish the building, then, in that event, you must repair the building to eliminate the many current violations of the Village Code, as set forth on Exhibit A.
>
> You need to promptly apply for and secure a building permit to do this corrective work, and diligently proceed to make the corrective repairs within 60 days.
>
> If you elect to proceed with the repairs and do so diligently but are unable to complete them within the 60 day period, the Village will extend the time for completion for a reasonable period of time, upon good cause shown by you, to afford you sufficient time to complete all the required repairs.
>
> If, however, you fail to apply for and obtain a building permit and make substantial progress on the required repairs within said 60 day period, then, in that event, the Village will conclude that

you have no intention to repair the building and will proceed accordingly.

The defendants did not respond to this supplemental notice. They did not demolish the building. They did not secure a building permit to do the corrective work nor perform the corrective work. (RP-354-357)

On February 25, 1999, Lake Villa was granted leave to file its second amended complaint. (C-290) There was no substantive change in Counts I or II but Count III was modified to allege the service of the supplemental notice. (C-211-289)

On July 19, 2000, this matter proceeded to trial. Lake County, Illinois, Health Department sanitarian Schaefer testified that she inspected the property on June 4, 1998, with the other Lake County inspection crew. (RP-22) At that time she observed mouse droppings throughout the building and two piles of large mammal animal feces. (RP-25-26, 41-43) She observed many openings, holes, and gaps in the exterior of the building by which vermin or other animals could access the building. (RP-44-45) She further testified that mice can spread diseases. (RP-29) She issued a notice of violation of accumulation animal waste and infestation of vermin.(Pl.Ex. 29) She indicated that she had received no response from the defendants afer she issued the notices of violations other than a request by Stokovich's attorney that the notice indicate the correct article and section number. She then issued an amended notice but received no further response from the defendants. (Pl.Ex. 17)

Village Clerk Alice Brownlee testified that no potable water had been provided by the village to the building since 1989. (RP-50, 56)

Dorothy Stokovich, the trustee owner, testified that she had sold the building to her son, Nick, for $100,000 and

that he has paid $25,000 to her. (RP-61) She stated that the building was about 100 years old (RP-69) and that Nick had taken over responsibility for maintenance of the building in about 1980. (RP-65-66)

August "Augie" Hibel, who is the chief building inspector for the Lake County, Illinois, Building Department, testified at length. The defendants acknowledged that he was a pretty fair and honest guy. (RP-548)

Hibel testified inter alia:

He has been the chief building inspector since 1992 and has worked for Lake County since 1983. (RP-74-75) Prior to that he was building commissioner for North Chicago. (RP-75) He made two inspections of the property with his crew on June 4, 1998, and May 4, 2000. (RP-78-79)

He described the building generally as very dilapidated and deteriorated. (RP-79-80) The guard rails are dangerous and do not comply with code requirements. (RP-82-83, Pl.Ex. 10) The gutters are loose and pulling away from the building. (RP-83) The eaves which project over the sidewalk are falling apart. The roof is badly deteriorated. The chimney has missing bricks. (RP-85) There are numerous broken windows. (RP-85) There is widespread and severe water damage inside the building. (RP-85 & 95, Pl.Ex. 11 B, C, & D) There is no electrical power to building. (RP-90) The water heater is rusted out and non-functional.(RP-91) There is plaster falling off ceilings.(RP-91, Pl.Ex. 40 B & C, 41 A) The roof is leaking like a sieve. (RP-92), Pl.Ex. 41 A) The floors are missing structural blocking underneath. (RP-93, Pl.Ex. 41 C & D) The electrical wiring is substandard. (RP-93) There are holes in the roof. (RP-93-94, Pl.Ex. 42 A) The rafters and sheathing of roof are rotted and very deteriorated. (RP-95-96)

He testified that in his opinion it was unsafe for anyone to be in or near the building due to the overall condi-

tion of the property including the falling off to the street and sidewalk of pieces of the building, the plaster falling down within the building, the non-functioning doors, and dangerous hand rails. (RP-101, 125-126, 203-204)

He also stated that the building is damaged or deteriorated more than 50% of its value. (RP-105-106) The building does not conform with zoning setbacks. (RP-107) The guardrails do not comply with code and are danger to public. (RP-107-108) The building has been unheated for some time with resulting extensive damage. (RP-117) The failure to heat the building exacerbates wood rot of structural members. (RP-118)

He also testified to numerous violations of the Property Maintenance Code (Pl.Ex. 23):

a. (RP-108-109) violation of 304.1 exterior unsafe pieces of overhang falling off.

b. (RP-109-110) roof members damaged in violation of 304.3.

c. (RP-111) exterior walls deteriorated in violation of 304.5.

d. (RP-112) overall roof is badly deteriorated in violation of 304.6 and has caused extensive water damage.

e. (RP-113) overhangs do not comply with 304.8.

f. (RP-115) chimneys defective, missing bricks, spalling.

g. (RP-116) glazing broken in violation of 304.11.

h. (RP-116) door frames and doors not operable in violation of 304.11.

i. (RP-118) basement windows do not have guards 304.15.

j. (RP-119) exterior doors non-code; deteriorated and broken 304.13.

k. (RP-120) interior is deteriorated and violates 305.1.

l. (RP-120) interior stairs do not have functioning rails 305.5.

m. (RP-123) plumbing does not comply with 505.1.

n. (RP-123) heating does not comply with 602.2.

o. (RP-125) ingress inadequate and violates 702.1.

He indicated that the building is unsafe to people who use the adjacent sidewalk. (RP-125-126) He observed no substantive change in the building from 1st inspection to 2nd inspection, but the 2nd inspection revealed holes in roof. (RP-127-129) The front porch is sagging due to unstable foundation. (RP-150) The roof had at least three holes into the sky. (RP-150151) The fireplace is in rough condition with brick misplaced. (RP-170-171) It would cost more to rehab building then it is presently worth. (RP-175-176) There was no difference between two inspections except for more patchwork. (RP-197) Most doors are non-functional. (RP-203-204) The property is not clean, safe, or secure. (RP-234)

He also stated that the property was a blight on the neighborhood. (RP-235) He indicated that it would basically require a complete replacement of the building except for part of the framing to render this building into a habitable structure.(RP-235-238)

Lake County plumbing inspector Thompson, who has been an Illinois-licensed plumber for 25 years and previously a plumber apprentice for 5 years, testified that he was current on plumbing regulations.(RP-253-256) He indicated that the plumbing system in the building was

completely non-functional. A complete replacement of the plumbing system would be necessary as the existing system can not be safely salvaged. (RP-257-262) Open waste lines within the building create the danger of methane gas which can be fatal (RP-258-259). The problem is more severe because there is no running water in the building to fill the plumbing traps which prevent the gases from escaping into the building. He also indicated that there was a danger of contaminating the Village water system if this building were to be hooked up to the municipal system. (RP-260-261) He stated that the fact that the water was presently shut off did not cure this problem since any plumber could reconnect the building at any time. (RP-270-271) He found no change between inspections. (RP-264) Article 8/9-160 of the building code does require a building to have a functioning plumbing system. (RP-276)

Lake County mechanical inspector Wierzgac, who has 23 years in the field, testified that he was current on codes through 1993. (RP-279) The building does not have a functional heating system. (RP-280) The venting is non-functional. (RP-282) The roof decking and soffits are rotted. (RP-285-286) He also observed racoon feces in the building. (RP-293)

Lake County structural inspector Wells testified that the roof structure and roof decking were deteriorated with holes in the roof. (RP-302) He observed rotted lumber and lumber hanging down out of place. (RP-309-310)

Lake County inspector and village trustee Bill Effinger testified that he had lived in Lake Villa all his life. (RP-316) He has observed racoons in the building. (RP-321) He has observed preschool children and other pedestrians walk alongside the building in the area where portions of the roof and overhang have fallen from the building. (RP-325-327) It was he who originally posted the red tag

on the building in 1997. (RP-328-329) Over the course of time the building has progressively deteriorated. (RP-329)

Nick Stokovich testified as an adverse witness. He has lived at his current home since 1992 or 1993. (RP-346) He did receive Pl.Ex. 18 in October, 1997. (RP-347) He did not thereafter obtain a demolition permit nor did he apply for or secure a building permit. (RP-348-349) He did receive the letter of January 7, 1998, Pl.Ex. 5. (RP-351) At that time he also did not get a demolition permit nor a building permit. (RP-351) He also received the November 7, 1998 letter, Pl.Ex 7. (RP-351-352) Again, he did not get any building permit. (RP-354-355) The building was last used as a nursing home in 1977.(RP-357) It was last inhabited on a regular basis in 1992. (RP-358) It last had running water, water heaters, and an operating sink in 1992. (RP-358) The building is about 45 feet high. (RP-359) The building has not been heated since 1989. (RP-362) He is responsible for maintenance of the building. (RP-363-364)

Structural engineer Rogalla testified that he had observed damaged areas at the south end of the building in joists and that about 500 square feet of roof needed to be replaced. (RP-440-441, 465-466) He also observed damage to flooring. (RP-443) The roofing needed repair. (RP-445) In fact, the roofing throughout looked bad and needed to be replaced. (RP-446) He opined that it might be cheaper to repair the building rather than demolish and rebuild. (RP-457) In reaching this conclusion he acknowledged that he had not secured any bids and admitted that he did not take into account the cost to repair or condition of the mechanical systems such as the electrical, heating, and plumbing systems. (RP-458, 470) He further did not take into account the zoning height limitation and setback requirements. (RP-470-474)

Skip Krueger testified for the defendants. He is a manufacturer's representative for Ideal Industries. (RP-479) He had previously had a heating and ventilating business that had evolved into a small contracting business. (RP-481) He had done work for the defendants in the past including heating and ventilating work at their new nursing home. (RP-485)

Krueger testified that he had prepared an estimate to convert the building into a single family residence. Over plaintiff's objection the estimate was admitted. (Defendant. Ex 9, RP-490-491). He acknowledged that he had not entered into a contract to do the work. The estimate did not include insulating the walls or a furnace. (RP-496, 504-505) He stated that he would not enter into contract for the estimate amount but would add more for a contract price. (RP-505) His actual price would be closer to $75,000. (RP-506) In preparing his estimate, he did not take into account that the 3rd floor would have to be removed due to height limitations of the zoning ordinance. (RP-506-507) He also did not take into account the need to move the foundation back to satisfy the setback requirements. (RP-507-508)

Desko Nokitovic, a licensed real estate salesman since 1996, then testified. (RP-510-511) He had been involved in some sales or showings in Lake Villa. (RP-513) He went inside the building in 1998. (RP-514-515) He did not indicate that he had done any type of market analysis or found comparable sales to do a market analysis of the building. The plaintiff's objection to his testifying to his opinion of the value of the building was sustained for inadequate foundation. (RP-516-518)

Nick Stokovich testified for the defendants. He has worked at the Libertyville Manor Nursing home since 1977. (RP-519-520) He agreed to pay $100,000 to buy the building from his mother. (RP-520) He has been

responsible for the property since 1978. (RP-520) He stated that he also was a licensed real estate person but is not active in that field. (RP-519, 534) He stated that he was familiar with real estate values in Lake Villa. (RP-534) The plaintiff's objection to his opinion of value was also sustained. (RP-534-535) Stokovich made an offer of proof that the value of the property was $150,000 to $160,000.

At the conclusion of the trial, the trial court found that the building was dangerous and unsafe and ordered demolition on Count I. Count II which sought an order to do the necessary corrective work was deemed moot. On Count III, the court entered judgment in favor of Lake Villa but deferred imposing the fines at that time and indicated the fines would depend in part upon whether the defendants accomplished the demolition within 30 days, which did not occur. (C-500, 515-516). On October 21, 2002, the Appellate Court vacated its June 27, 2002, Rule 23 order, which had affirmed the trial court, and entered its decision in which the Appellate Court found 65 ILCS 5/11/31-1 unconstitutional and reversed and remanded for the trial court to grant a reasonable period of time for repair before ordering demolition.

Lake Villa appealed to the Illinois Supreme Court. On February 20, 2004, the Illinois Supreme Court issued its decision in which it reversed the appellate court and found the demolition statute, 65 ILCS 5/11/31-1, constitutional. However, the court also vacated the demolition order and remanded for further proceedings. The court agreed with the trial court that the building is dangerous and unsafe but concluded that the trial court's finding that the building is beyond reasonable repair was not supported by the evidence. The petition for rehearing was denied on May 24, 2004.

I. Argument

Lake Villa urges that the petition for writ of certiorari should not be granted.

A. No Jurisdiction

This Court does not have jurisdiction pursuant to *28 U.S.C. 1257*. The February 20, 2004, Illinois Supreme Court opinion is not a final order within the meaning of the jurisdiction statute. *San Diego Gas & Electric Co. v. City of San Diego* (1981) 450 U.S. 621,630-633, 101 S. Ct. 1287,1293-1294. The case was remanded for further proceedings which will include a determination by the trial court if Stokovich will be given another opportunity to repair the building and if a demolition order is to be entered. *Village of Lake Villa v. Dorothy Stokovich et al.* (2004) 211 Ill.2d 106, 810 N.E.2d 13; *Aurora v. Meyer* (1967) 38 Ill.2d 131, 230 N.E.2d 200, 203. The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

B. Case Not Ripe For Review

If this Court determines that it does have jurisdiction, in the alternative, the case is not yet ripe for review. The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

Stokovich argues before this Court that the statute does not provide for an opportunity for repair *after* the trial in which the building is found dangerous an unsafe. However, whether Stokovich will now be afforded an additional opportunity to repair is not yet known. Upon remand, if the trial court finds that the building is in fact not beyond reasonable repair, it will order Stokovich to perform the repairs. If the repairs are not done, then the

trial court will order demolition. On the other hand, if after reviewing the Illinois Supreme Court opinion and hearing any additional evidence it deems advisable, the trial court finds that the repairs would constitute substantial reconstruction within the meaning of *Aurora v. Meyer* (1967) 38 Ill.2d 131, 230 N.E.2d 200, 203, the court may order demolition without any additional opportunity for repairs. The point is that the case is not yet ripe for this Court to review. Stokovich may yet receive another opportunity to repair. For this Court to consider the case at this juncture would be premature and contrary to judicial economy.

C. Case Is Not in Conflict with Other State Court Decisions

None of the cases or affected statutes cited by Stokovich are comparable to Illinois with its demolition statute. *65 ILCS 5/11-31-1.* Unlike other jurisdictions, an order of demolition comes not from the municipality but rather from a court after a trial on the merits in which the municipality must plead and prove that the building is dangerous and unsafe. Unlike other jurisdictions, even before a suit is filed, the owner must be given written notice and has an opportunity to repair at any cost before the lawsuit is filed.

65 ILCS 5/11-31-1(a) provides in part:

> The corporate authorities shall apply to the circuit court of the county in which the building is located (I) for an order authorizing action to be taken with respect to a building if the owner or owners of the building, including the lien holders of record, after at least 15 days' written notice by mail so to do, have failed to put the building in a safe condition or to demolish it or (ii) for an or-

> der requiring the owner or owners of record to demolish, repair, or enclose the building or to remove garbage, debris, and other hazardous, noxious, or unhealthy substances or materials from the building.

Even after the court has a trial on the merits the statute has already been construed to require the trial court to allow the owner an opportunity for repair before ordering demolition unless substantial reconstruction is necessary to effectuate the repairs. *Aurora v. Meyer* (1967) 38 Ill.2d 131, 230 N.E.2d 200, 203.

The cases cited by Stokovich are readily distinguishable and not in conflict with the Illinois Supreme Court decision in this matter. In *Johnson v. City of Paducah* (Ky.App.1974) 512 S.W.2d 514, demolition was ordered and the owner was denied <u>any</u> opportunity to repair because the cost of repair would exceed 50% of the value of the property. That court also found that an owner should have a chance to repair no matter what the cost before demolition is ordered.

In *Horton v. Gulledge* (1970) 277 N.C. 353, 177 S.E.2d 885, the owner was also ordered to demolish the building with <u>no</u> chance to repair because the cost of repairs would exceed 60% of the value of the property. The estimated cost to repair was between $500-700 and the value was between $2,000 to $3,000. The court found the mandatory demolition just because of the 60% cost factor invalid because it denied the owner <u>any</u> opportunity to repair.

In *Washington v. City of Winchester* (Ky.App.1993) 861 S.W.2d 125, 127, the owner was also given <u>no</u> opportunity to repair because of a provision in the property maintenance code that mandates demolition if the estimated cost of repairs is in excess of 100% of the value of the property. That court followed the holding of *Johnson v. City of*

Paducah (Ky.App.1974) 512 S.W.2d 514 and held that the owner should have been given an opportunity to repair.

Stokoviches' reliance on *Shaffer v. City of Atlanta* (1967) 223 Ga. 249, 154 S. E. 2d 241 is similarly ill-advised. In Shaffer, the city ordered the building demolished and thereafter refused to allow the owner to obtain a building permit to correct the problems. In the case at bar, the Stokoviches were invited to secure a permit to do the necessary corrective work, as evidenced by the notice sent by the building department on October 3, 1997 (Pl.Ex. 18.) as well as the Lake Villa supplemental notice. (Pl.Ex. 9). In the case at bar, we don't even know yet if Stokovich will be afforded another opportunity to repair or if an order of demolition will be entered.

The Stokoviches complain that the statute does not give them an opportunity to repair but the underlying facts are otherwise. They cannot complain of a fate which has not befallen them. On September 25, 1997, the building was red-tagged. (Pl.Ex. 34, 3rd page) The red tag indicated the building was unsafe, dilapidated, and animal infested. On October 3, 1997, the building department advised Dorothy Stokovich that the unsafe abandoned structure must be brought up to present building code or demolished. (Pl.Ex. 18, Appendix 9.)

No action was taken to demolish the building, to secure a building permit, nor to do any corrective work on the building. On January 7, 1998, the village attorney wrote to both Dorothy and Nick Stokovich that the building was in dangerous and unsafe condition and must be demolished within 30 days. (Pl.Ex. 5, Appendix 10) The Stokoviches did not demolish the building, secure a building permit, nor do any corrective work. (RP-348-349)

What is also different from all the cases relied upon by Stokovich is that even after the suit was filed Lake

Villa advised the Stokoviches that they could repair the building in lieu of demolition if they so chose.

On November 17, 1998, by certified mail (Pl.Ex. 7), and on December 11, 1998 by first class mail (Pl.Ex. 9), Lake Villa sent the Stokoviches a supplemental notice. A copy was also posted on the building. (Appendix 11) The supplemental notice provided in part:

> This notice supplements and expressly does not supersede the prior notice dated January 7, 1998, from myself to you.
>
> In the event that you do not desire to demolish the building, then, in that event, you must repair the building to eliminate the many current violations of the Village Code, as set forth on Exhibit A.
>
> You need to promptly apply for and secure a building permit to do this corrective work, and diligently proceed to make the corrective repairs within 60 days.
>
> If you elect to proceed with the repairs and do so diligently but are unable to complete them within the 60 day period, the Village will extend the time for completion for a reasonable period of time, upon good cause shown by you, to afford you sufficient time to complete all the required repairs.
>
> If, however, you fail to apply for and obtain a building permit and make substantial progress on the required repairs within said 60 day period, then, in that event, the Village will conclude that you have no intention to repair the building and will proceed accordingly.

The Stokoviches did not respond to this supplemental notice. They did not demolish the building. They did not secure a building permit to do the corrective work nor

perform the corrective work. (RP-354-357). Unlike the owners in the cases cited by Stokovich, the Stokoviches had an opportunity to repair before the suit was filed, as well as while the suit was being prosecuted, both because of the lapse of time between the date the complaint was filed to the date of trial, a period in excess of two years, and through the supplemental notice from Lake Villa.

The decision of the Illinois Supreme Court is consistent with and not in conflict with the state cases cited by Stokovich.

D. No Conflict with *Miller V. Schoene*

In *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246 (1928) the order to fell cedar trees to avoid the spread of cedar rust disease to nearby apple trees was affirmed. Stokovich fails to articulate how this case is in conflict with the decision in *Village of Lake Villa v. Dorothy Stokovich et al.* The demolition order was vacated. At this juncture, it is unknown if the trial court will ultimately enter a demolition order.

II. Conclusion

Lake Villa submits that a writ of certiorari should not issue. This Court does not have jurisdiction because the decision is not final. In the alternative, the case is not yet ripe for review and Stokovich has failed to establish that the decision is conflict with any federal or state cases which might warrant the issuance of the writ. Lake Villa requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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